Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

VICKY MORIN,

Petitioner,

v.

UNITED STATES OF AMERICA; AND DOES I – X,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals in *Morin v. United States* No. 05-16702 (9th Cir. 07/24/2007) violated fundamental fairness and the Plaintiff's Fourteenth Amendment Due Process and Equal Protection rights by affirming the District Court's arbitrary and capricious order granting Defendant's Motion for Summary Judgment which was based on most egregious irrational reasoning?

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A case dispositive Motion for Summary Judgment was granted against petitioner in *Morin v. United States*, CV-N 03-0503 HDM-RAM on July 15, 2005. (App. A-1) This ruling was appealed in *Morin v. United States*, No. 05-16702 (9th Cir. July 24, 2007) This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3. The opinion of the three judge panel of the Court Of Appeals affirming the District Court Ruling was filed on July 24, 2007. (App. A-25)

JURISDICTION

The opinion of the Court Of Appeals was filed on July 24, 2007. The Court Of Appeals denied a petition for rehearing and rehearing *en banc* on September 11, 2007. (App. A-28) The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment rights of Due Process and Equal Protection are accorded parties in Federal Actions through their Fifth Amendment due process rights. *Bolling v. Sharpe* 347 U.S. 497 (1954)

Under "newer" equal protection jurisdiction claims will lie "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no

rational basis for the difference in treatment". *Village of Willowbrook v. Olech*, 528 U.S. 562 ¶ 11.

Rational reasoning is the very foundation the principles of fundamental fairness and of the Due Process and Equal Protection rights in our judicial system. No judge, either Federal or State, has the discretion to use an irrational basis as the foundation of an opinion. "The requirement to provide appropriate findings and an analysis is especially applicable to expert testimony. Expert medical testimony cannot be dismissed without providing a thorough, rational explanation for doing so because to do otherwise would be tantamount to arbitrary and capricious decision-making." *Dickerson v. Secretary of DHHS,* 35 Fed.Cl. 593, 601 (1996)

This petition for certiorari involves a major, national judicial policy issue of exceptional importance. There is at present an epidemic of judicial rulings that are based upon reasoning so egregious that it defies rational explanation. These rulings are absurd on their faces. The absence of a rational connection between the facts found and the choice made makes them arbitrary and capricious and grossly erroneous. *Natural Resources. v. U.S.*, 966 F.2d 1292, 97, (9th Cir. '92).

The cited *Daubert* rulings are based on irrational reasoning so arbitrary and capricious as to offend principles of fundamental fairness and the command of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. These rulings prohibit competent, qualified experts from

giving reasonable and rational opinions regarding carcinogenic substances.

STATEMENT OF THE CASE

On February 27, 2003, the Petitioner, Vicky Morin (hereinafter referred to as MORIN), filed a SF95 claim under the Federal Tort Claims Act (FTCA claim) against the United States Department of the Navy (hereinafter referred to as USN) seeking compensation for her brain cancer caused by exposure to jet fuel and jet exhaust while being employed at the Fallon Naval Air Station (hereinafter referred to as NAS Fallon). In this claim, MORIN identified Dr. Gary C. Ridenour, her diagnosing and treating physician, as her witness. The USN failed to answer the administrative claim and this litigation ensued with a complaint filed in the United States District Court for the District of Nevada on September 12, 2003, against the United States of America (hereinafter referred to as USA). USA answered the complaint.

On December 31, 2003, the parties agreed to a scheduling order which required, inter alia, the disclosure of experts by May 18, 2004. On March 25, 2004, the parties stipulated to an order extending deadlines established in the prior order. The new deadline for disclosing experts was July 19, 2004. MORIN had previously disclosed Dr. Ridenour as an expert witness in the FTCA Claim in 2003 and, on July 3, 2004, MORIN submitted the expert witness affidavit of Dr. Gary C. Ridenour to USA in rebuttal

to the USA's Motion To Dismiss and/or For Summary Judgment. On August 16, 2004, MORIN submitted the expert, rebuttal report of Dr. Ridenour to USA.

On September 2, 2004, the USA sought a dismissal or summary judgment asserting two separate grounds. First, that MORIN's claim was barred by the statute of limitations. Second, that there was no reliable scientific evidence showing that jet fuels are capable of causing the brain plasmacytoma (a rare variant of multiple myeloma) that MORIN suffered. In its motion, the USA also argued that MORIN failed to disclose her expert witness in a timely manner.

MORIN filed a Motion To Strike the USA's Expert Witness Report by Drs. Wysner and Scott on grounds that it does not satisfy the requirements of Rule 702 or the U.S. Supreme Court's guidelines established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). and the USA responded by stating that Drs. Wysner and Scott's opinions considered the question of general causation rather than specific causation and their methodologies were appropriate for that purpose. The motion was denied on February 23, 2005.

On February 5, 2005, the District Court denied the USA's Motion to Dismiss without Prejudice.

On February 22, 2005, MORIN moved for Summary Judgment on the issues of general and specific causation and in It's Reply in Support of Summary Judgment attached journal articles produced by Dr. Gary Ridenour. The USA moved for Summary Judgment, inter alia, on the ground that general causation is not established.

After lengthy litigation on procedural issues and in the absence of a full and fair *Daubert* hearing, on June 14, 2005 cross motions for Summary Judgment were heard.

On July 15, 2005 Judge Howard D. McKibben denied Plaintiff's Motion for Summary Judgment and Defendants' Motion to Dismiss on Statute of Limitations Grounds. The Judge granted Defendants' Motion to Exclude Plaintiff's Sole Expert Causation Witness on "*Daubert*" grounds based solely on that expert's affidavit and in the absence of direct or cross examination and ignoring Dr. Ridenour's deposition testimony. The Judge also granted Defendants' Motion to Exclude Plaintiff's Sole Expert Causation Witness as a Sanction Under Fed.R.Civ.Proc. 37. This was done without proper notice and without allowing the Plaintiff to cure the Defendants' perception of error. In addition, the Court could show no prejudice what-so-ever to the Defendant. The Court could show no intentional conduct what-so-ever on the part of the Plaintiff which could legitimately cause the Defendants' perception of error. The Court ignores the numerous stipulations to enlarge deadline times entered into by the Plaintiff for the convenience of the Defendant. The District Court then dismissed the Complaint

with prejudice as to all Defendants. (App. A-1) An appeal to the Ninth Circuit was timely filed.

The Ninth Circuit Court of Appeals three judge panel's decision was filed on July 24, 2007 affirming the District Court's Opinion. (App. A-25) The Court Of Appeals denied a petition for rehearing and rehearing *en banc* on September 11, 2007. (App. A-28) This petition is in response to that decision. The Court has jurisdiction under 28 U.S.C. § 1254(1).

ARGUMENT

The clear and plain language of the District Court's order (App A) in this case states verbatim:

> "A medical degree or training does not confer any magical quantities upon those experts for both Plaintiff and Defendant who testified on the causation issue". *Sutera v. Perrier Group of America Inc.* 986 F.Supp. 655, 667 (D.Mass. 1997) (treating physician was an oncologist and hematologist but lacked expertise to testify as to causal link between benzene and leukemia).

The District Court order, affirmed by the Appeals court is based on egregiously irrational reasoning and violates fundamental fairness.

In *Sutera* the plaintiff's treating physician who "lacked expertise" was Dr. Robert Jacobson, a

world renowned expert in benzene induced leukemia. Like Dr. Ridenour, Dr. Jacobson is a Currently Licensed constantly peer reviewed busy medical doctor.

Dr. Jacobson is a Board Certified Internist and a Board Certified Hematologist and Oncologist, Dr. Robert Jacobson, is a world renowned expert in benzene induced leukemia. Dr. Jacobson came to this causation opinion in the course and scope of his day to day practice of medicine. As a licensed practicing physician, Dr. Jacobson's non-litigation general and specific causation opinions are constantly peer reviewed by the United States Health and Human Services Agency for Medicare Reimbursement, peer reviewed by the United States Drug Enforcement Agency for controlled substance prescriptions, peer reviewed by his State Medical Board for general and specific causation opinions and treatment protocols, peer reviewed by the hospitals in which he has admitting privileges for general and specific causation opinions and treatment protocols, peer reviewed by the Universities in which he has appointments for his professional opinions and teaching policies.[1] To opine

[1] Dr. Jacobson is also the Medical Director of The Helen and Harry Gray Cancer Institute, Good Samaritan Medical Center, West Palm Beach, Florida, Dr. Jacobson is also the Director of the Bone Marrow and Stem Cell Transplantation Program at the same institution. Dr. Jacobson is a Consulting Professor of the Department of Medicine, Duke University Medical Center

that Dr. Jacobson "lacked expertise to testify as to causal link between benzene and leukemia" is egregiously irrational and absurd on its face. To find that Dr. Ridenour, also a currently licensed practicing physician with extensive experience in cancer diagnosis and treatment, is unqualified to testify for the same reason is also egregiously irrational and violates fundamental fairness, is arbitrary and capricious. Fundamental fairness is the essence of Fourteenth Amendment Due Process and Equal Protection rights.

The Order goes on to say,

> Dr. Ridenour opined that Morin's plasmacytoma (a rarely occurring variant of multiple myeloma) was caused by exposure to jet fuel and/or jet engine exhaust, but he did not conduct any independent research to support his conclusion that jet fuel and jet engine exhaust were generally capable of causing plasmacytoma, nor did the studies he

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in Durham, North Carolina, and a former Professor of Medicine and Pathology as well as Co-Director of the Hematologic Oncology Service at the Vincent T. Lombardi Cancer Center, Georgetown University. Dr. Jacobson was also the Interim Chairman of the Department of Medicine, Georgetown University School of Medicine. (http://www.findcancerexperts.com/aboutus.medboard.html)

> cited provide sufficient support for that principle. See Shewit Bezabeh et al., Does Benzene Cause Multiple Myeloma? An Analysis of the Published Case-Control Literature, 104 (Supp. 6) Envtl. Health Persp. 1393, 1397 (Dec. 1996) ("[B]enzene exposure is unlikely to be a causal agent for multiple myeloma."). (App. A-25)

This statement also has no rational basis and is violative of the principles of fundamental fairness as well as the Plaintiff's Fourteenth Amendment rights.

The records are replete with the fact that Mrs. Morin was a heavy cigarette smoker. Prior to the discovery of the true cellular character of Mrs. Morin's brain tumor (plasmacytoma/multiple myeloma not associated with cigarettes and positively associated with motor exhaust exposure), Dr. Ridenour and Mrs. Morin's other treating physicians considered, in their differential diagnoses, a variety of cigarette and benzene induced cancers such as metastatic lung cancer, malignant meningioma, and metastatic breast cancer (a common hormonally associated cancer).

It was only after learning of the true histology of the tumor, that Dr. Ridenour altered his differential diagnosis and came to the opinion that it was caused by the jet exhaust to which Mrs. Morin was literally bathed on a regular basis. Mrs. Morin also reported in her Federal Tort Claims Act complaint and testified in her deposition that she

was literally bathed in jet fumes and fuel while working at the approach end of the main runway of NAS Fallon.

Given that benzene is a major component of cigarette smoke it is clear from his records, reports and deposition that Dr. Ridenour, initially considered benzene induced tumors in his initial differential diagnosis but after learning of the true histologic nature of her tumor he changed his differential diagnosis and no longer considered benzene as a cause of Mrs. Morin's malignant plasmacytoma.

Dr. Ridenour provided the Court with studies that diesel exhaust is associated with Mrs. Morin's tumor and this was corroborated by Defendants' own experts Drs. Whysner and Scott of July 16, 2004 linking multiple myeloma to tractor engine exhaust. Diesel exhaust and jet engine exhaust are virtually identical.

Considering the above scientific and legal analysis, it is clear that the District Court opinion (affirmed by the Appeals Court) used egregiously irrational reasoning as a basis for its statement expressed above. The use of egregiously irrational reasoning in their opinion violates the principles of fundamental fairness and Mrs. Morin's Fourteenth Amendment Equal Protection and Due Process rights.

Another statement based upon irrational reasoning in the Ninth Circuit Order in this case is "Additionally, although differential diagnosis is

generally accepted as a scientifically valid methodology supporting admissible testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), Dr. Ridenour's expert report did not show whether or how he applied differential diagnosis in determining the cause of Morin's plasmacytoma. See *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1058 (9th Cir. 2003)." (App. A-1)

This statement has no rational basis and violates fundamental fairness because Dr. Ridenour is a licensed medical doctor with a busy medical practice. Medical doctors use differential diagnosis to make both general and specific causation opinions on a day to day basis. These causation opinions are constantly peer reviewed. Dr. Ridenour is a medical doctor who holds a current State of Nevada license in good standing, a current license from the U.S. Drug Enforcement Agency in good standing, a current license in good standing from the U.S. Department of Health and Human Services. Dr. Ridenour is a member in good standing of the medical staff at several hospitals in Fallon, NV and was the former Director of the Department of Emergency Medical Services in the City of Saint Louis. As such Dr. Ridenour's causation opinions are under constant peer review by the U.S. Department of Health and Human Services, the U.S. Drug Enforcement Agency, the State of Nevada Medical Board, and the Staff review committees of the hospitals at with he holds privileges. The records reflect that Dr. Ridenour made his causal opinion on Mrs. Morin's tumor in the course and scope of his

professional medical practice. It is simply irrational to reason that such a busy, peer reviewed professional doesn't use differential diagnosis in his medical practice.

Judge McKibben goes on to write that Dr. Ridenour, who has been Mrs. Morin's personal physician for over 20 years, failed to "even mention the use of differential diagnosis and his report does not illustrate that he followed this methodology."

This is simply an irrational statement. As legal research is to the practice of law, differential diagnosis is a foundational element to the practice of medicine. As it is taken for granted that a judge or lawyer uses legal research as a tool in his/her assessment of a case, it is taken for granted that a treating physician uses differential diagnosis in his/her assessment of a case. Indeed Dr. Ridenour, in his affidavits and his deposition states clearly that he considered Mrs. Morin's heavy cigarette smoking as the most probable cause of her brain cancer. He entertained the diagnosis of metastatic lung cancer, metastatic breast cancer and benign or malignant meningioma in his differential diagnosis.

It was not until the histopathology revealed a malignant plasmacytoma which is unrelated to cigarettes and is related to diesel fume exposure, that he formed his opinion on causation. This is a clear and incontestable demonstration that Dr. Ridenour used differential diagnosis as a foundation for his opinion. The Trial Court's ruling that Dr. Ridenour didn't use differential diagnosis in his causation opinion is based on irrational reasoning.

The Court's use of irrational reasoning in it's opinion is violative of the principles of fundamental fairness as well as Mrs. Morin's Fourteenth Amendment Due Process rights.

Indeed, in *Clausen, supra* the Appeals Court states it previously accepted an expert's testimony because it was, "based on [the expert's] knowledge of the connection between collagen and various autoimmune disorders, combined with [the expert's] observation of [the Plaintiff's] injuries and her medical history and laboratory tests". *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1229-30 (9th Cir.1998) This is on point with the case at bar. The record is clear that, Dr. Ridenour in his reports and his deposition reveals that he has knowledge of the connection between motor exhaust fumes and multiple myeloma, combined with Dr. Ridenour's observation of Mrs. Morin's injuries and her medical history and laboratory tests.

REASONS FOR GRANTING THE PETITION

Although the *Daubert* series of cases are intended to increase the quality of expert witness testimony, there is an epidemic of *Daubert* decisions that are based on irrational reasoning and therefore lacking in a rational basis. In addition to the irrational findings in *Sutera v. Perrier* a recent decision in *Knight v. Kirby Inland Marine Inc,* 482 F.3d 347 (5th Cir. March 19, 2007) the court ruled that the Plaintiffs' expert testimony was flawed because each and every one of fifty (50) peer reviewed medical journal articles cited as supporting the expert's opinion were irrelevant to the case. The

expert in this case was Barry S. Levy, M.D., M.P.H. Adjunct Professor of Community Health, Tufts University.

> Dr. Levy has devoted his entire career to public health -- as a practitioner, educator, scientist, consultant, program director, and organizational leader. Most of his work has been in environmental and occupational health. He has been a medical epidemiologist for the Centers for Disease Control; a professor at the University of Massachusetts Medical School, where he founded and directed its occupational health program; and an international health program director. He has worked in more than 20 countries, primarily developing countries of Africa and Asia and countries in Central and Eastern Europe.
>
> Dr. Levy has written more than 100 published articles and book chapters and edited 14 books and monographs, including three editions of a textbook on work-related disease and its prevention; a book on international perspectives on environment, development, and health; and, most recently, the book War and Public Health.
>
> He currently serves on the boards of APHA (American Public Health Association), the International Commission on Occupational Health, and the Alliance to End Childhood Lead Poisoning. (http://www.solutions-site.org/artman/publish/article_81.shtml)

The idea that a Professor at one of America's finest medical schools who has published so extensively in the peer reviewed medical literature would submit fifty (50) irrelevant peer reviewed medical journal articles to a Court of Law is not simply irrational, it is absurd on its face. As such the ruling in *Knight* has no rational basis and violates the principles of fundamental fairness and the Plaintiff's Fourteenth Amendment Rights.

Again, in the Sixth Circuit a world renowned expert in dioxins, Dr. William Sawyer testified that the four Plaintiffs' dioxin congener blood levels were above the 95th percentile of the normal range distribution in the general population. *Adams v. Cooper Industries, Inc. and McGraw Edison Company Civil Action No. 03-476-JBC* "The plaintiffs' claim that, in comparing the bellweather plaintiffs' blood dioxin levels with the CDC data, Dr. Sawyer analyzed whether the plaintiffs' blood levels exceeded the 95th percent confidence interval ("CI") surrounding the geometric mean for the appropriate age group, as reported in the NHANES data and Millette."(Hon. Jennifer B. Coffman Memorandum Opinion and Order in *Adams v. Cooper Industries, Inc. and McGraw Edison Company Civil Action No. 03-476-JBC* p. 2)

Based on these comparisons, Dr. Sawyer concluded that "the results of the blood dioxin analyses ... reveal 11 of the 29 PCDDs/Fs and coplanar PCBs as reported by the laboratory were

abnormally elevated in comparison to CDC reference ranges." Id p.3 Judge Coffman opined that Sawyer's scientific reasoning was flawed.

> The court finds the reasoning of *Allgood* [*Allgood, et al., v. General Motors Corp.*, Case No. 1:02-cv-1077-DFH-TAB, U.S. District Court for the Southern District of Indiana, Indianapolis Division, September 18, 2006] both persuasive and applicable to Dr. Sawyer. Dr. Sawyer essentially opines that congener levels above the mean are "abnormal." As noted by the District Court in *Allgood*, this method would permit an expert to allege that roughly one-half of the United States population exhibits abnormal levels of dioxins, furans, and PCBs. Such a definition of abnormality would deprive the term of all meaning. Although above-average levels of these chemicals may be a cause for medical concern (as Dr. Sawyer claims), this does not mean that such levels are indicative of unusual or abnormal exposures. Dr. Sawyer's failure to account for the statistical spread or range of the NHANES data is a severe problem with his methodology. Id p. 3

Indeed Her Honor acknowledges that Dr. Sawyer is calling only those results above the 95 percentile as abnormal:

"The plaintiffs attempt to distinguish *Allgood* on the grounds that the study relied upon by the expert in that case did not purport to establish any statistical boundaries or percentiles and that the expert also failed to utilize the 95% CI, as Dr. Sawyer has done here." Id p. 4

And yet Her Honor still rules that Dr. Sawyer's science is flawed.

In her ruling the Judge contends that 50% of the world's population could be in the 95th percentile of the geometric mean distribution curve. This routinely used statistic guarantees to within 95% certainty that the value is not "normal". It is obvious that 50% of the world's population could not be included at levels statistically significantly above average as documented by the 95% CI. This is simply a mathematical impossibility and an irrational basis for the Judge's ruling in this case violates the principles of fundamental fairness and the Plaintiff's Fourteenth Amendment Rights.

As mentioned in the pleadings, the facts and circumstances of this case are closely tied to those of the children of Fallon where the incidence of acute lymphoblastic leukemia is 2000+ times higher than unexposed children. Two other cases, *Snyder v. U.S.A. et al.* (03-15187), *Galaz v. U.S.A. et al.* (04-15970) have been filed involving the same or similar facts and circumstances. The Fallon leukemia cluster is a "biological gold mine" which will provide invaluable scientific information on the basic biology

of childhood cancer.[2] The discovery in this series of cases has, so far, revealed vast arcas of environmental contaminants which, more probably than not, are responsible for the leukemia cluster. Further discovery will uncover valuable scientific evidence which will lead to an understanding of the basic genetics of adult and childhood cancer. It would serve as a severe scientific setback to cut this litigation short based upon bizarre, nonsensical reasoning because it chills the ardor of legitimate scientists to further investigate the environmental causes of this disaster.

The situation in this litigation is not unusual. Numerous times scientists and physicians find judges impugning their methodology using totally nonsensical reasoning. This practice not only chills the ardor of real scientists (as opposed to litigation specialists) to engage in the legal system but it also violates the very foundation of our legal system, fundamental fairness.

In this petition, Mrs. Morin asks the Court for one single, simple remedy. That is to remand the case back to the District Court and to provide her with the right to have her experts as well as the defense experts subjected to vigorous direct and cross examination in a full and fair *Daubert* hearing in front of a rational, fair, impartial, disinterested judge.

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[2] In addition to being the attorney of record, the writer is also an expert in environmentally induced childhood malignancies.

A vigorous direct and cross examination of all experts in this case will substantially advance medicine, science and the law.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CLERK, U.S. DISTRICT COURT
BY /s/_____DEPUTY

VICKY MORIN, CV-N-03-0503-HDM (RAM)
Plaintiff,

v. **ORDER**

UNITED STATES OF AMERICA
and DOES, I-X, inclusive,
Defendants.

Plaintiff Vicky Morin ("plaintiff") filed this action against the United States alleging that exposure to jet fuel caused her to develop a malignant plasmacytoma of the brain. This case is currently before this court on cross-motions for summary judgment. (See (#38,40)). Defendant, the United States, argues that it is entitled to summary judgment because the suit is untimely under the Federal Tort Claims Act and because plaintiff has failed to establish a causal link between jet fuel and cancer in regard to her negligence claim. (See (#38)). Plaintiff argues that she is entitled to summary judgment on the issues of general and specific causation because she has established a causal link between the jet fuel and the

cancer. (See (#40)). Because plaintiff has failed to establish a causal link between jet fuel and cancer, and because causation is a necessary element of plaintiff's negligence claim, defendant's motion for summary judgment is granted.

I. Background

Plaintiff was employed by the Allen Corporation from 1982 to 1986. During her time with the company she worked in a building located at the end of an active runway at the U.S. Naval Air Station in Fallon, Nevada ("NAS Fallon"). Plaintiff alleges that she was "literally bathed in jet fuel routinely dumped by Navy jet aircraft on their approach to landing." (*See* (#2) at ¶ 6). Plaintiff contends that she was exposed to constant fumes in the air from the jet fuel. (*See* (#40) Ex. 3 at 3). Throughout her period of employment with the Allen Corporation, plaintiff experienced skin irritations, blisters, and was sick all the time. (*See* (#40) Ex. 4 at 102-05). In her deposition, plaintiff testified that she believed that exposure to the jet fuel caused her health problems. (*See id.*).

Plaintiff also claims that between 1978 and 1980, her home was situated under the flight path for planes taking off and landing at the NAS Fallon and that her home was "daily bathed" with jet fuel. (*See id.*). Similarly, plaintiff maintains that in 1981 she moved to a ranch that was on the flight path for two bombing ranges and during this period her home was regularly bathed in ported jet fuel. (*See id.*).

Around January 2000, plaintiff began

experiencing blurred vision, disorientation, and discovered a "soft spot" on her temple. (*See* (#40) at 157-60). Over the next several months, the soft spot continued to grow and, in July and August 2000, one of plaintiff's eyes started bulging out. (*See id.* at 158-60).[1]

In November 2000, plaintiff went to see her primary care physician, Dr. Ridenour. On November 22, 2000, Dr.Ridenour requested a brain scan because of the swelling she was experiencing around her eye. (*See* (#40). The scan revealed a large mass in the orbital area. Dr. Ridenour told plaintiff that she had a tumor that was probably a meningioma, a tumor of the membranes enclosing the brain. (*See* (#40) Ex. 4 at 259-60).

On November 29, 2000, plaintiff consulted with a neurosurgeon, Dr. Joseph Walker. (*See* (#40) Ex. 5). Plaintiff told Dr. Walker that, about fifteen months earlier, she had first noticed that skin on her head sounded like leather when she scratched it. After reviewing the MRI and CT, Dr. Walker confirmed that plaintiff had a brain tumor. On February 23, 2001, plaintiff underwent surgery to remove the tumor. After the surgery, the tumor was identified as a malignant plasmacytoma rather than a meningioma.

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[1]During the summer of 2000, news regarding the leukemia cluster in Fallon became widespread. Plaintiff conducted her own internet research during this time and found several sites which attributed certain cancers to exposure to benzene. Plaintiff began developing a website about the leukemia cluster and its potential relationship to benzene.

On February 27, 2003, plaintiff presented an administrative claim to the United States Navy, (*see* (#40) Ex. 7), alleging that exposure to the jet fuel caused her tumor. On September 16, 2003, after six months of non-action, plaintiff filed the present suit against the United States.

II. Standard of Review

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R.Civ.P. 56©). The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party, and for this purpose, the material lodged by the moving party must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles,* 141 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *Lynn v. Sheet Metal Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1302, 1306 (9th Cir. 1982). If the parties file cross-motions for summary judgment the court must consider each party's motion separately and determine whether that party is entitled to a judgment under Rule 56. In making these determinations, the court must evaluate the evidence offered in support of each cross-motion. *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249

F.3d 1132, 1136-37 (9th Cir. 2001).

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, the respondent must show by specific facts the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978); see also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 596 (1993) ("[I]n the event the trial court concluded that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free ... to grant summary judgment.") Moreover, "[i]f the factual context makes the non-moving party's claim of a disputed fact implausible, then that party must come forward with more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial." *Blue Ridge Insurance Co. v. Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing *Cal. Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory allegations that are unsupported by factual data cannot defeat a motion for summary judgment.

Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

Finally, if the nonmoving party fails to present an adequate opposition to a summary judgment motion, the court need not search the entire record for evidence that demonstrates the existence of a genuine issue of fact. *See Carmen v. San Francisco Unified Sch. Dist.,* 237 F.3d 1026, 1029-31 (9th Cir. 2001) (holding that "the district court may determine whether there is a genuine of fact, on summary judgment, based on the papers submitted on the motion and such other papers as may b e on file and specifically referred to and facts therein set forth in the motion papers"). The district court need not "scour the record in search of a genuine issue of triable fact," but rather must "rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 44 F.3d 247, 251 (7th Cir. 1995)). "[The nonmoving party's] burden to respond is really an opportunity assist the court in understanding the facts. But if the nonmoving party fails to discharge that burden – for example by remaining silent – its opportunity is waived and its case wagered." *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 405 (6th Cir. 1992).

III. Statute of Limitations under the FTCA

Plaintiff filed her administrative claim with the United States Navy on February 27, 2003. (*See* (#40) Ex. 7). the United States argues that it is entitled to summary judgment because plaintiff was aware of the information on which she based her claims more than

two years prior to February 27, 2003 (*See* (#40) at 9).

The Federal Tort Claims Act requires that a claim against the United States must be submitted to the appropriate federal agency "within two years after such claim accrues." 28 U.S.C. § 2401 (b); *Herrera-Diaz v. United States Dept. of Navy*, 845 F.2d 1534, 1536 (9th Cir. 1988). In cases involving latent diseases, medical malpractice, and wrongful death, the ninth Circuit has applied a "discovery rule" to the accrual of 28 U.S.C. § 2401 (b). *See Winter v. U.S.*, 244 F.3d 1088, 1090 (9th Cir. 2001); *Rosales v. United States*, 824 F.2d 799, 805 (9th Cir. 1987). Thus, a claim accrues when the "plaintiff has discovered, or in the exercise of reasonable diligence should have discovered, both its injury and its cause." *Davis v. United States*, 642 F.2d 328, 331 (9th Cir. 1981).

It is undisputed that plaintiff knew that she had a brain tumor prior to February 27, 2001. (*See* (#40) Ex. 5-6) (Dr. Walker's diagnosis of a tumor on November 29, 2000). Additionally, in January 2000, plaintiff told her son that she knew that she had a brain tumor. (*See* (#40) Ex. 4 at 157). However, conflicting evidence exists as to whether plaintiff knew or reasonably should have know the cause of her injury.

Plaintiff argues that she could not have possibly known that her cancer was caused by jet fuel prior to her surgery, on February, 2001, because of the nature of the tumor. Plaintiff admits that she is a heavy smoker and was smoking as much as three packs a day during the relevant time period. When she was

diagnosed with a meningioma a reasonable inference could be drawn that she and her doctors would have attributed the tumor to her chronic smoking. (*See* (#40) Ex. 4 at 259-60). When the tumor was removed on February 27, 2001 it was found to be a malignant plasmacytoma, a type of cancer not generally associated with smoking. Conversely, factual evidence exists to show that plaintiff had all the information on which she based her claim that exposure to jet fuel caused her ailment before that date. Plaintiff testified that throughout her period of employment with the Allen Corporation, she experienced skin irritations, blisters, and was sick all the time. (*See* (#40) Ex. 4 at 102-05). Moreover, she testified that she believed that her exposure to the jet fuel caused these ailments. (*See id.*). Additionally, plaintiff was acutely aware of the widespread coverage of the Fallon leukemia clusters having created a website that dealt with benzene, leukemia, and the cluster, and she discussed the possible link between benzene and myelomas with her treating physician. (*See id.* at 170-71).

The conflicting evidence on when plaintiff reasonably should have know the cause of her injury creates a general issue of material fact that ultimately must be determined by the trier of fact prior to the court deciding whether this action is time-barred. Accordingly, summary judgment is inappropriate as to the statute of limitations defense.

IV. Causation

Plaintiff has sued the United States alleging that the negligent dumping of jet fuel at NAS Fallon

cause plaintiff's brain tumor. The only evidence proffered to establish general and specific causation is the plaintiff's untimely filed expert report, from her treating physician, Dr. Ridenour. (*See* (#40) Ex. 12). The United States argues that Dr. Ridenour's report should be excluded for two reasons. First, Dr. Ridenour's report is unreliable and inadmissible under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). Second, plaintiff failed to disclose Dr. Ridenour's report by the July 19, 2004, the deadline for disclosing expert witnesses. Plaintiff has filed her own motion for summary judgment (#38) on the issues of general and specific causation. Plaintiff argues that there is no evidence that jet fuel can cause a malignant plasmacytoma and she is entitled to judgment as a matter of law.

A. Admissibility of Dr. Ridenour's Report

In admitting expert testimony, Federal Rule of Evidence 702 requires that two preliminary determinations be made by the trial court. First, the proffered witness be qualified as an expert by reason of his or her knowledge, skill, experience, training, or education. *See* Fed. R. Evid. 702. Second, the proffered expert's opinion must be based on scientific, technical, or other specialized knowledge, that will assist the trier of fact to understand the evidence or determine a fact in issue. *Id.*

1. Qualifications

The question of whether the witness is

sufficiently qualified as an expert is a matter to be decided by the court. *See* Fed. R. Evid. 702, *see also* Fed. R. Evid. 104(a). In assessing whether an expert has the appropriate qualifications, the court considers whether the expert offers some special knowledge, skill, experience, training, or education on the subject matter. Fed. R. Evid. 702; *United States v. Hankey,* 203 F.3d 1160, 1168 (9th Cir. 2000). If an individual is not qualified to render an opinion on a particular question or subject, it follows that his opinion cannot assist the trier of fact with regard to that particular question or subject. *See Whiting v. Boston Edison Co.*, 891 F.Supp. 12, 24 (D.Mass. 1995) ("Just as a lawyer is not by general education and experience qualified to give an expert opinion on every subject of the law, so too a scientist or medical doctor is not presumed to have expert knowledge about every conceivable scientific principle or disease").

Plaintiff's proffered expert is Gary C. Ridenour, M.D., plaintiff's treating physician. (*See* (#40) Ex. 12). Dr. Ridenour is a licensed physician who has practiced in Fallon, Nevada for over 20 years (*Id.*). He has diagnosed and treated over a thousand patients for cancer, at least fifty of whom had multiple myeloma. (*Id.*). He has knowledge of the plaintiff's health for almost 20 years and was the first to diagnose her with a brain tumor which proved to be a malignant plasmacytoma. (*Id.*).

This court is cognizant that the resolution of the causation in many cases turns on the testimony of treating physicians. *See Mason v. Texaco, Inc.,* 741 F.Supp. 1472, 1496 (D.Kan. 1990), aff'd in part, 948

F.2d 1546 (10th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992); *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir. 1995) (permitting treating physician to render an opinion that combining alcohol with therapeutic doses of acetaminophen caused liver disease in light of "medical community's daily use of the same methodologies in diagnosing patients"). However, as many courts have found, certain issues of causation "do not lend themselves to the same certainties as do diseases such as asbestosis, whose cause is readily attributable to a particular agent or class of agents." *Mason*, 741 F.Supp. at 1497 ("A medical degree or training does not confer any magical qualities upon those experts for both plaintiff and defendant who testified on the causation issue."); *Suttera v. Perrier Group of America, Inc.*, 986 F.Supp. 655, 667 (D.Mass. 1997) (treating physician was oncologist and hematologist but lacked expertise to testify as to causal link between benzene and leukemia). This is such a case. Without scientifically reliable evidence, plaintiff cannot show a causal connection between jet fuel and a malignant plasmacytoma sufficient to submit this case to the trier of fact.

Dr. Ridenour has not expertise in toxicology, epidemiology, risk-assessment, or environmental medicine. Although he is a physician with expertise in diagnosing and treating cancer, the ability to diagnose and to treat a disease is substantially different from the expertise required to assess its genesis to a reasonable degree of scientific certainty. *Id.* at 667. Moreover, Dr. Ridenour has not done any original research or published any papers about jet fuel or its

potential cancerous effects. Dr. Ridenour may very well be qualified as an expert with regard to the general practice of medicine and the ability to diagnose and treat cancer. But this court must assess whether he is qualified to testify as to the causal link between jet fuel and cancer. Based upon his report, his qualifications, and experience, this court finds that Dr. Ridenour has failed to establish sufficient expertise as to that particular question. Nevertheless, this court will assess his report to determine its admissibility under Rule 702 and Daubert.

2. Dr. Ridenour's Report

Plaintiff has introduced Dr. Ridenour's report to establish generally that jet fuel can cause a malignant plasmacytoma and to establish specifically that the jet fuel at NAS Fallon caused plaintiff's cancer. The following is the complete text of Dr. Ridenour's report.

Summary of My Assignment and Opinions

> I have been asked to consider whether the exposure to jet fuel exhausts have caused Mrs. Vicky Morin's malignant plasmacytoma. My answer is yes. I base my opinion on my training, education, experience, the medical record, my care and treatment of Mrs. Morin and my own personal experience with Mrs. Morin's job and the Naval Air Station (NAS) Fallon and its aircraft. I have also read the Report of John Whysner, MD, PhD, DABT, and Samuel

J. Scott, MD MPH, FACOEM written for the defense in this case. I have been asked to briefly comment on the shortcomings of that report.

My Qualifications, Training and Experience

I am currently licensed physician practicing medicine in Fallon, Nevada for over 20 years. I have diagnosed and treated over 1000 cancers in my own, personal patients. At least 50 of these were multiple myeloma. I have followed Mrs. Morin for over 20 years and it was I who initially diagnosed her brain tumor which proved to be a malignant plasmacytoma. Please see my attached curriculum vita.

The Whysner Scott Report

I have reviewed the Whysner Scott Report and find that I (disagree with their conclusions on the carcinogenity of raw, unburned fuel. Unburned motor fuels of all types have been linked to various cancers including multiple myeloma.[fn1] In addition, the doctors completely ignore the fact that Mrs. Morin was also exposed to large amounts of jet engine exhaust from the Naval Aircraft operating at NAS Fallon. I can attest to this fact since I saw her on several occasions when she came to my

office from her workplace at NAS Fallon. Her clothes were damp and literally reeking of the stench of jet exhaust.

It is well accepted that engine exhausts are a known cause multiple myeloma.[fn2] The defense experts in their own reports admit that tractor engine exhausts are associated with multiple myeloma.[fn3] Tractors burn both kerosene (jet fuel) and diesel which is closely related chemically to jet fuel.[fn4]

Conclusion

It is my opinion; to a reasonable degree of medical certainty that Mrs. Morin's malignant plasmacytoma was caused by her exposure to jet fuel exhaust emanating from jet aircraft operating at NAS Fallon.

Compensation and Testimony in last 4 years

I have been paid $3,000 for this report. My hourly fee for testimony as a medical expert in depositions and court testimony is $500.00 per hour. I have testified in several medical malpractice cases in last 4 years.

fnl Studies have shown an increased prevalence in patients who have been exposed to fuel oil products, agricultural

workers, miners, and sheet metal workers. http://www.21stcenturyoncolcgy.com/cancer/cancer_specific_myeloma.html

fn2 Shewit Bezabeh, Arnold Engel, Carolyn B. Morris, and Steven H. Lamm Does Benzene Cause Multiple Myeloma? An Analysis of the Published Case-Control Literature Environmental Health Perspectives, Volume 104, Supplement 6, December 1996

fn3 Whysner/Scott report July 16, 2004 p.21 ¶ 2.

fn4 Kerosene - fuel for jet engines and tractors; starting material for making other products liquid is a mix of alkanes (10 to 18 carbons) and aromatics with a boiling range of 175 to 325 degrees Celsius. Diesel fuel is a mix of alkanes (12 or more carbon atoms) with a boiling range of 250 to 350 degrees Celsius.

3. Daubert and Fed. R. Evid. 702

The Supreme Court's decision in *Daubert* established the duty of a trial judge, under Fed. R. Evid. 702, to play the role of a gatekeeper, insuring that the fact-finding process does not become distorted by what is popularly called junk science. *See Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 142; *see also Kennedy v. Collagen Corp.,* 161 F.3d 1226, 1229-30 (9th Cir. 1998); *Whiting v. Boston Edison Co.*, 891 F.Supp. 12,

24 (D.Mass. 1995). This role is especially sensitive in cases where the plaintiff claims that exposure to a toxic substance caused her injury, because a jury may accept an expert's opinion that conforms with their underlying fears of toxic substances without carefully understanding or examining the basis for that opinion. *See id.*

Under *Daubert*, the trial court performs its gatekeeping function by determining if the proffered evidence is both relevant and reliable. *Daubert*, 509 U.S. at 589-95. Scientific evidence is deemed reliable if the principles and methodology used by the expert proffering it are grounded in the methods of science. Id. at 592-95. In *Daubert*, the Supreme Court gave a non-exhaustive list of factors for determining whether scientific testimony is sufficiently reliable to be admitted into evidence, including: (1) whether the theory or methodology can be, and has been, tested (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, (4) the existence and maintenance of standards controlling the methodology's operation and, finally, (5) general acceptance in the relevant community. *Id.* at 393-94. Additionally, if an expert does not conduct his or her own research, independent of the litigation, on the subject of the testimony, the district court must determine "whether there exists any objective, verifiable evidence that the testimony is based on scientifically valid principles." *Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 605 (9th Cir. 2002) (internal citations omitted) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317-18 (9th Cir. 1995) ("Daubert II")).

Experts may demonstrate the scientific validity of a theory or technique by showing that "the research and analysis supporting the proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication." *Daubert II*, 43 F.3d at 1318. Alternatively, testifying experts may also show the validity of their theory by explaining "precisely how (the experts) went about reaching their conclusions and pointing to some objective source–a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like–to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in the field." *Id.* At 1319.

Dr. Ridenour's opinions, as expressed in his report, do not meet the necessary standard for reliability under Daubert. The *Daubert* factors refer to the "theory or technique" that is the basis for the expert's scientific evidence and expert opinion. Dr. Ridenour's report contains no mention of a specific scientific theory or technique used in reaching his conclusions, nor it there any reference to a body of scientific knowledge or principles that was drawn upon in the evaluation. Because the theory or technique used is unknown, there is no proof that Dr. Ridenour's methods of evaluation have been or even can be tested.[2] There is no evidence of peer review or

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[2]Plaintiff's attorney, Dr. Levin, claims that Dr. Ridenour used "differential diagnosis" as the foundation for his expert opinion. (*See*, (#46) at 6-7),. This court appreciates that plaintiff's attorney is a licensed physician, but Dr. Levin cannot offer

publication, of the error rate for the particular scientific technique used, or the level of acceptance for the theory or technique in the scientific community.

In applying the *Daubert* factors, pursuant to Fed. R. Evid. 702, Dr. Ridenour's report must be excluded because (1) Dr. Ridenour's opinion is not supported by reliable scientific evidence; (2) his opinion failed to follow an appropriate methodology to determine general or specific causation and (3) Dr. Ridenour is not qualified to render an expert report regarding whether exposure to jet fuel caused plaintiff's tumor.

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testimony in an attempt to bolster Dr. Ridenour's report. Rather as an expert, Dr. Ridenour's report must speak for itself. However, the report fails to even mention the use of differential diagnosis and his report does not illustrate that he followed that methodology. Once general causation is established, an expert utilized a differential diagnosis procedure to eliminate the other most likely causes of a condition. (*See In re Breast Implant Litigation*, 11 F.Supp.2d 1217, 1229 (D.Colo. 1998). In the present instance, if Dr. Ridenour had established generally that jet fuel can cause a malignant plasmacytoma, using the differential diagnosis procedure he needed to attempt to eliminate all other causes of plaintiff's condition. Dr. Ridenour's report does not even mention other potential causes that may have affected plaintiff, nor how he was able to eliminate them from being the cause of plaintiff's tumor. Dr. Ridenour's report makes no mention of any such potential alternative factor, causes, including medical history, environmental, etc., even in an attempt to eliminate them under the differential diagnosis method. While plasmacytoma is a blood-related cancer and is not typically associated with smoking, Dr. Ridenour's report makes no mention of plaintiff's smoking habit which consisted of 3 packs a day. The report instead simply offers a conclusory statement unsupported by any methodology.

Dr. Ridenour's report is an attempt to establish causation without employing an appropriate methodology and without providing reliable scientific evidence that supports his conclusion. The website that Dr. Ridenour cites for his proposition that unburned motor fuels of all types have been linked to various cancers including multiple myeloma, is not peer reviewed and does not support his position. The website states "[s]tudies have shown an increases prevalence in patients who have been exposed to fuel oil products, agricultural workers, miners and sheet metal workers. The specific etiologic factors regarding multiple myeloma are unknown."[3] The article that Dr. Ridenour cites to support his position that engine exhausts are a known cause of multiple myeloma concludes that "causes of multiple myeloma are not clear" and that "causal agents for multiple myeloma have not been found." (*See* (#20) Ex. 15).

Dr. Ridenour's reliance on the Whysner/Scott report to support his third assertion is misplaced.[4] In

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[3]http://www.21stcenturyoncology.com/cancer/cancer_specific_myelomal.html

[4]Plaintiff takes a twofold approach to the experts' report of defendant. First, plaintiff cites the Whysner/Scott report for the proposition that jet motor exhaust causes plasmacytoma. (*See* (#38) at 4). As discussed, this court rejects that assertion. Second, plaintiff argues that the Whysner/Scott report is based upon pure junk science and relies upon reports that make "absolutely no mention of adult cancers, adult plasmacytoma, or adult multiple myeloma." (*See* (#47) at 9).

relevant part, the report states that the "majority of epidemiological studies which have evaluated the risk or myeloma among agricultural workers have reported positive associations.... Various studies have linked these elevated risks to an array or exposures including grain dusts, certain farm animals, pesticides, and tractor engine exhausts." This statement is insufficient to support the conclusion that jet fuel caused plaintiff's cancer. Rather this statement shows that the most consistent association of multiple myeloma with occupations has been agricultural workers but the actual causative agent has not been identified. Finally, Dr. Ridenour makes a statement about kerosene and diesel being closely related chemically to jet fuel, but provides no evidence or peer reviewed article to support this conclusion.

In sum, Dr. Ridenour's report is precisely the kind of subjective testimony that is inadmissable pursuant to Rule 702 and as clarified by *Daubert* and its progeny.

4. *Timeliness of Expert Disclosure*

Even though this court has already found that Dr. Ridenour's report is inadmissable under Rule 702, this court will consider defendant's alternative argument that the expert testimony be excluded as a sanction under Rule 27 of the Federal Rules of Civil Procedure for failure to comply with this court's scheduling order.

Under the scheduling order, the deadline for disclosing witnesses was July 19, 2004. (*See* (#10)).

Plaintiff failed to disclose any expert witnesses by July 19, 2004. On July 27, 2004, the United States contacted Plaintiff by letter (*see* (#40) Ex. 10) and asked whether plaintiff was going to rely on any expert reports. On August 4. 2004, plaintiff's counsel stated by email that he would offer Dr. Ridenour's report as a rebuttal expert. (*Id.*) On August 4, 2004, the United States sent plaintiff's counsel a letter reserving the right to object to Dr. Ridenour's report because plaintiff is the party with the burden of proof and "was required to disclose any expert evidence necessary to prove its prima facie case on or before the date of expert witnesses, July 19, 2004." (*See* (#40) Ex. 11). On August 13, 2004, plaintiff submitted the "rebuttal report" of Dr. Ridenour. (*See* (#40) Ex. 12).

"A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992). A district court's decision to honor the terms of its binding scheduling order does not simply exalt procedural technicalities over the merits of the case. *See id.* Disregard of scheduling orders undermines the court's ability to control its docket, disrupts the agreed-upon course of the litigation, and rewards the indolent and the cavalier. *See id.*

A party "that without substantial justification fails to disclose information requires by Rule 26(a) shall not, unless such failure is harmless, be permitted to use as evidence at a trial any information not so disclosed." Federal Rules of Civil Procedure 37(c)(1). If full compliance with Rule 26(a) and 26(e)(1) is not

made, Rule 37(c)(1) mandates some sanction, the degree and severity of which are within the discretion of the trial judge. The Ninth Circuit has previously considered the issue of expert preclusion as one possible remedy for failure to comply with Rule. In *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990), the Ninth Circuit set out the test to determine the propriety of imposing the sanction of dismissal or default as a remedy for Rule 26 violatiors. The test requires a court to analyze 1) the public's interest in expeditious resolution of litigation; 2) a court's need to manage its docket; 3) risk of prejudice to the defendants; 4) public policy favoring disposition of cases on their merits; and 5) the availability of less drastic sanctions.

The public and the parties have an interest in expeditious resolution of litigation. Requiring the parties to comply with the Rules of Civil Procedure and with the court's scheduling order promotes achieving such goals by eliminating the need for continuances. Setting forth deadlines allows a court to manage its docket; defendant did not request an extension within which expert disclosure could be submitted. There is no indication that the parties stipulated to an extension of time to file expert disclosures.

Plaintiff offers absolutely no justification for missing the deadline for disclosure of expert reports. Rather, plaintiff appears to be attempting to circumvent this court's scheduling order by representing that Dr. Ridenour's report be admitted as a rebuttal report to the defendant's experts. While

"[p]ublic policy favors disposition of cases on their merits, that policy has a procedural as well as a substantive component." *Keener v. U.S.*, 131 F.R.D. 639, 642 (D.Mont. 1998). Plaintiff bears the burden of proof in this case and she must produce admissible evidence in her case in chief as to every factor in her negligence claim. The only proof of general and specific causation is the report of Dr. Ridenour.[5] Rather, than produce the expert report in a timely manner, plaintiff, without cause, missed the deadline, waiting until defendant's had filed their expert report, and attempted to meet their burden by submitting Dr. Ridenour's report as rebuttal evidence. This court finds and concludes that Dr. Ridenour's report was not timely filed in relation to the court's scheduling order and should be excluded.

IV. Conclusion

Dr. Ridenour's report is inadmissable under Fed. R. Evid. 702 and *Daubert*. Additionally, plaintiff failed to comply with this court's scheduling order in filing the report so it is inadmissable. Plaintiff has failed to present admissible evidence on the issue of causation. Accordingly, **IT IS ORDERED** that plaintiff's motion for summary judgment (#38) be

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[5]Plaintiff fails to realize that she bears the burden of introducing admissible evidence as to every element of her negligence claim during her case in chief. The only evidence plaintiff offers regarding general and specific causation is Dr. Ridenour's report. Even assuming that Dr. Ridenour's report were admissible as rebuttal evidence, plaintiff would still fail to produce any evidence of causation during her case-in-chief and defendant would be entitled to a directed verdict.

DENIED and defendant's motion (#40) be **GRANTED**.

Let judgment be entered accordingly.

Dated: This 15th day of July, 2005.

/s/
UNITED STATES DISTRICT JUDGE

FILED
JUL 24 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICKY MORIN,
Plaintiff - Appellant,

v.

No. 05-16702
D.C. No. CV-03-00503-HDM
MEMORANDUM*

UNITED STATES OF AMERICA,
Defendant - Appellee.

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Argued and Submitted July 12, 2007
San Francisco, California

Before: THOMPSON, RYMER, and FISHER, Circuit Judges.

Vicky Morin appeals the district court's grant of

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*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

summary judgment in favor of the United States of America on her Federal Tort Claims Act negligence case. Morin sought compensation from the United States for cancer she alleged was caused by her exposure to jet fuel and jet engine exhaust fumes while employed at the Naval Air Station in Fallon, Nevada. The district court held that Morin's only proffered expert testimony – that of her treating physician, Dr. Gary Ridenour – failed to provide sufficient evidence of causation to create a genuine issue of material fact for trial.

The district court did not abuse its discretion in excluding Dr. Gary Ridenour's testimony, and Morin otherwise failed to create a triable issue of causation. We therefore affirm.

Dr. Ridenour opined that Morin's plasmacytoma was caused by exposure to jet fuel and/or jet engine exhaust, but he did not conduct any independent research to support his conclusion that jet fuel and jet engine exhaust were generally capable of causing plasmacytoma, nor did the studies he cited provide sufficient support for that principle. See Shewit Bezabeh et al., *Does Benzene Cause Multiple Myeloma? An Analysis of the Published Case-Control Literature*, 104 (Supp. 6) Envtl. Health Persp. 1393, 1397 (Dec. 1996)("[B]enzene exposure is unlikely to be a causal agent for multiple myeloma."). Additionally, although differential diagnosis is generally accepted as a scientifically valid methodology supporting admissible testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), Dr. Ridenour's expert report did not show whether or how

he applied differential diagnosis in determining the cause of Morin's plasmacytoma. *See Clausen v. M/V New Carissa*, 339 F.3d 1049, 1058 (9th Cir. 2003). The district court was within its discretion in determining that Dr. Ridenour was not qualified to render an opinion as to general causation, and his method of reaching an opinion regarding specific causation was not sufficiently reliable to be admissible under Federal Rule of Evidence 702 and *Daubert*. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141-42 (1999).[1]

We further conclude that the district court did not abuse its discretion in failing to hold an evidentiary hearing regarding the admissibility of Dr. Ridenour's proffered testimony, as Morin did not request one and the district court had an adequate record. *Jaros v. E.I. Dupont (In re Hanford Nuclear Reservation Litig.)*, 292 F.3d 1124, 1138 (9th Cir. 2002); *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000).

AFFIRMED.

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[1]Morin also claims the district court erred in excluding Dr. Ridenour's testimony as a Federal Rule of Civil Procedure 37(c)(1) sanction for failure to timely serve her expert designation and report. We affirm the exclusion of Dr. Ridenour's testimony for the reasons discussed above, however, and do not reach the question whether the Rule 37 sanction was appropriate in this case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
SEP 11 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

VICKY MORIN,
Plaintiff - Appellant,

v.

No. 05-16702
D.C. No. CV-03-00503-HDM
District of Nevada, Reno

UNITED STATES OF AMERICA,
Defendant - Appellee.

Before: THOMPSON, RYMER and FISHER, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny appellant Morin's petition for rehearing. Judges Rymer and Fisher have also voted to deny her petition for rehearing by the court en banc, and Judge Thompson has recommended denial of that petition.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b). The petitions for panel rehearing and for rehearing by the court en banc are DENIED.